Kenya Trade and Development Company Limited v Bashari (Environment and Land Case Civil Suit 143 of 2022) [2023] KEELC 20420 (KLR) (2 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20420 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND CASE CIVIL SUIT 143 OF 2022

LL NAIKUNI, J

OCTOBER 2, 2023

BETWEEN

KENYA TRADE AND DEVELOPMENT COMPANY LIMITED ..... PLAINTIFF

AND

JAPHET MNDAMBO BASHARI ..... DEFENDANT

RULING

I. Introduction

1. The Plaintiff/ Applicant herein, Kenya Trade and Development Company Limited moved this Honorable Court for the hearing and determination of their Notice of Motion application dated 4th December, 2022. It was brought against the Defendant, Japhet Mndambo Bashari herein under a Certificate of urgency and the dint of the provisions of Order 40 Rule 1, of the *Civil Procedure Rules, 2010*, and Sections 1A, 1B,3A, 63(e), of the *Civil Procedure Act*, Cap.21.

2. In a nutshell, the main substratum of this matter pertains to whether the Plaintiff/Applicant should be granted temporary injunction orders restraining the Defendant/Respondent from having any interference with thee suit property; whether the said application by the Plaintiff/Applicant herein offended the Doctrine of "*Res Judicata*" and "*Sub – Judice*" as provided for by the respective provision of the law.

3. Upon service, the Defendant herein only did file a Memorandum of Appearance filed its Replying affidavit dated 19th December, 2022 opposing the said application accordingly.

II. The Plaintiff/ Applicant's case

4. The Plaintiff sought for the following orders:-

    a. Spent.

b. Spent.

c. That pending the hearing and determination of this suit, a temporary injunction be and is hereby issued restraining the defendant/respondent by himself, his agents, servants, employees, assigns or otherwise howsoever from erecting structures, buildings or developments and from offering for sale, selling, transferring alienating or in any way disposing of, and from trespassing onto any portion of, or in any way interfering with the plaintiff/applicant's quiet enjoyment, possession and use of the suit property being land known as L.R No. 10287/4 measuring approximately 410.6 Ha situated within Taita Taveta County.

d. That the costs of this application be provided for.

5. The application by the Plaintiff/Applicant herein was premised on the grounds, testimonial facts and averments made out under the 11 Paragraphed Supporting Affidavit of Basil Criticos sworn and dated 4th December, 2022. The Plaintiff/Applicant averred that:

i. The Plaintiff/Applicant is the current registered owner of all that parcel of land known as L.R. No. 10287/4 measuring approximately 410.6 Ha and situated within Taita Taveta County ["the suit property"].

ii. Prior to the Plaintiff/ Applicant's acquisition of the suit property, the suit property was as at 1988 owned by the Estate of the Late GeorgeCriticos and later by Basil Criticos who transferred the suit property to the Plaintiff/Applicant herein which is his company.

iii. In the month of November 2022, the Plaintiff/Applicant discovered that the Defendant/ Respondent had encroached on a part of the suit property without any lawful excuse. The Plaintiff/Applicant confronted the Defendant/Respondent and notified him that the Plaintiff/Applicant is the registered owner of the suit property and ordered the Defendant/ Respondent to immediately vacate the suit property to no avail.

iv. Despite the Plaintiff/Applicant's request to the Defendant/Respondent to peacefully vacate the suit property, the Defendant/Respondent had willfully refused, and unlawfully continues to occupy and intentionally trespass the Plaintiff/Applicant's suit property without any lawful excuse or consent of the Plaintiff/Applicant.

v. For instance and in defiance of the Plaintiff/Applicant's order to vacate the suit property, the Defendant/Respondent had proceeded to assemble construction materials on the suit property in readiness for erecting/building structures and houses on the Plaintiff/Applicant's suit property. In fact, the Defendant/Respondent was constructing structures and fencing on the Plaintiff/Applicant's suit property without any lawful excuse nor any colour of right to the suit land.

vi. The Plaintiff/Applicant was reasonably apprehensive that the Defendant/Respondent was actively building and or developing structures on the suit property with the aim of creating a factual situation on the ground and holding himself out as the owner of the portion of the suit property that he had invaded upon thereby infringing on the Plaintiff/Applicant's right to ownership, quiet possession and use of property.

vii. The speed with which the Defendant/Respondent was assembling construction materials on the said portion of the Plaintiff/Applicant's suit property raised extreme urgency warranting the immediate intervention of the Honorable Court by way of an injunction and impels the Plaintiff/Applicant to file this application before issuance of the Statutory Eviction Notice.

viii. The Plaintiff/Applicant stood to suffer irreparable harm and damage unless this Honourable Court intervenes and issues the injunction orders sought against the Defendant/Respondent to preserve the subject matter herein pending hearing and determination of this application and the suit.

III. The response by the Defendant/Respondent

6. On 19th December, 2022, the Defendant filed a 22 Paragraphed Replying Affidavit sworn by Japhet Mndambo Bashari, the Defendant herein in opposition of the application together with one (1) annexture marked as "JJMB 1" annexed thereof. He stated as follows: -

a. In reply to the contents of Paragraph 2 of the Supporting Affidavit, he averred that whereas the Plaintiff claimed ownership of the suit property known as LR No 10287/1.I wish to state that he had a title deed to Plot No 779 Taita/Taveta/Lake Jipe Scheme a fact that was acknowledged by the Plaintiff/Applicant via Search No 1407/22 conducted on 30th August 2022.

b. Further to the contents of Paragraph 4 above, there was a restriction in the form of an Injunction Order obtained in Mombasa ELC No 125 of 2018.

c. In addition to the contents made out under Paragraph 5 above, the present Application was seeking similar and identical orders as those already obtained in another Civil case - Mombasa ELC No. 125 of 2018.

d. The Applicant herein had deliberately failed to disclose to this court the parties in Mombasa ELC No 125 of 2018.

e. The parties in Mombasa ELC 125 of 2018 was "*Basil Criticos & Kenya Trade & Development Co Limited – Versus - AIC Makutano & Others*" including himself who was Defendant No. 85 after the motion to add parties by the Plaintiff in ELC No. 125 of 2018 was allowed. Annexed herein and marked as "JMB – 2" was a copy of the pleadings filed by the deponent herein Basil Criticos.

f. The subject matter in Mombasa ELC No. 125 of 2018 was the same as herein and so are the parties.

g. Further to the averments made out under Paragraph 9 in the affidavit, that Mombasa ELC No. 125 of 2018 was pending hearing and determination before Hon Justice Naikuni.

h. In addition to the contents made out under Paragraph 10 of the affidavit, the pending application and suit was an abuse of the court process.

i. The instant application had not met the requisite threshold to warrants issuance of the Orders sought, because the Plaintiff/Applicant had deliberately failed to make material disclosure of an existing and pending suit over the same subject matter.

j. In answer to the averments under Paragraph 3 of the affidavit, sometimes in the year 1990 the Plaintiff/Applicant sold LR. No 10287/4 & LR No 10287/1 to the settlement fund trust where after the two parcels were consolidated to create Lake Jipe Settlement Scheme.

k. The said purchase by the settlement fund trust LR. No. 10287/4 & LR. No. 10287/1 ceased to exist since it was sub divided and himself together with many other allocated land and finally issued with title.

l. He was presently the registered owner of Plot No. 779 Taita/Taveta/Lake Jipe Scheme.

m. The content of made out under Paragraph 4 of the Supporting Affidavit were denied. He had never met Basil Criticos nor had he been issued with a demand letter asking that he vacate.

n. Paragraph 5 of the affidavit was opposed. He had a title to the suit land; his occupation was thus lawful.

o. In response to the contents of Paragraph 6 of the affidavit, he averred that the he became the registered owner of the suit property sometimes in 2015, it was immediately thereafter that he fenced the suit land to prevent herders from grazing their cows on the suit land.

p. Contrary to the averments by the Applicant, fencing was done way before the commencement of this suit. The materials on the suit land are not for constructions. He had not begun digging of foundation. In any event his use and occupation is legal.

q. The contents of Paragraphs 7,8,9 and 10 were denied.

r. The affidavit was in opposition to the notice of motion application dated 4th December, 2022

IV. Submissions

7. On 7th February, 2023 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 4th December, 2022 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and on 23rd March, 2023 a ruling date was reserved on Notice by Court accordingly.

A. The Written Submissions by the Plaintiff/Applicant

8. On 6th February, 2023, the Learned Counsel for the Plaintiffs through the Law firm of Messrs. Prof. Albert Mumma & Company Advocates filed their submissions dated 3rd February, 2023. Mr. Obok Advocate commenced his submission in respect of the Plaintiff's Application dated 4th December, 2022 by stating that the same sought for the following orders:-

i. Spent.

ii. Spent.

iii. Spent.

iv. That pending the hearing and determination of this suit, a temporary injunction be and is hereby issued restraining the Defendant/Respondent by himself, his agents, servants, employees, assigns or otherwise howsoever from erecting structures, buildings or developments and from offering for sale, selling, transferring alienating or in any way disposing of, and from trespassing onto any portion of, or in any way interfering with the plaintiff/applicant's quiet enjoyment, possession and use of the suit property being land known as L.R No. 10287/4 measuring approximately 410.6 Ha situated within Taita Taveta County.

v. That the costs of this application be provided for.

9. The Learned Counsel observed that on the 20th December, 2022, the Court (Justice S.M. Kibunja) issued orders maintaining the obtaining status quo pending hearing and determination of the application. The submissions were in respect of prayer (3) of the application seeking injunctive orders pending hearing and determination of the suit and prayer (4) seeking costs. The Defendant filed a Replying Affidavit sworn on 19th December, 2022 but failed to annex the exhibit referred to therein in

the copy that was served on the Plaintiff/ Applicant. The Defendant/ Respondent was made aware of this fact vide Plaintiff/Applicant's email dated 1st February, 2023.

10. On the issues to be determined by this Honorable Court were mainly whether the plaintiff/applicant has met the threshold for grant of temporary injunction pending hearing and determination of the suit. The Learned Counsel submitted that the application brought under Order 40 Rule 1 of the *Civil Procedure Rules* amongst other provisions of the law and relied on the case of "*Giella – Versus - Cassman Brown & Company Ltd* (1973) EA 358 where the court held that the Applicant must demonstrate three things namely:-

    a. A *prima facie* case with a probability of success.

    b. That he is likely to suffer damage that cannot be adequately compensated in damages.

    c. That the balance of convenience is in favor of granting the injunctive orders sought.

11. On the first test of establishing a prima facie case with a probability of success, the Learned Counsel cited the Court of Appeal case of:- "*Mrao Limited – Versus - First American Bank of Kenya Limited & 2 Others* Civil Appeal No. 39 of 2002" defined what "prima facie' case is in the following words:-

> "A prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

12. The Learned Counsel submitted that the Plaintiff was the lawful registered owner of all that land known as L.R. No. 10287/4 measuring approximately 410.6 HA situate within Taita Taveta County ["the suit property"]. See Certificate of Title dated 21st September 2017 at pages 2-3 of the Exhibits annexed to the supporting affidavit to the application. Prior to the Plaintiff/Applicant's acquisition of the suit property, the suit property was as at 1988 owned by the Estate of the Late George Criticos and later by Basil Criticos who transferred the suit property to the plaintiff/applicant herein which is his company. See Grant at pages 4-11 of the Exhibits annexed to the supporting affidavit to the application.

13. The Learned Counsel submitted that the Defendant/Respondent had trespassed onto a portion of Plaintiff/Applicant's said suit property without any lawful excuse or consent of the Plaintiff/Applicant and had assembled construction materials thereon with a view to building structures/houses thereon and has further erected an illegal fence on the said suit portion of the suit property while refusing to vacate. See photos at pages 12-14 of the Exhibits annexed to the supporting affidavit to the application.

14. The Learned Counsel submitted that in his Replying Affidavit to the application, the Defendant/ Respondent alleged that the suit property was sold to the settlement trust fund upon which the suit property was purportedly consolidated with another property to create a purported Lake Jipe Settlement Scheme which was then purportedly subdivided upon which the Defendant/Respondent was allocated land being illegal Title No. Taita Taveta/Lake Jipe Scheme/779 within the purported scheme. See paragraphs numbers 4, 13, 14, 17 & 18 of the Replying Affidavit. Also see official search dated 30th August 2022 at page 16 of the Exhibits annexed to the Supporting Affidavit to the application.

15. However, the fact of the matter was that neither the Plaintiff/Applicant nor the Plaintiff/Applicant's predecessors in title sold the suit property to the Settlement Fund Trust or at all nor participated in or consented to or had knowledge of the purported consolidation and creation of the purported scheme

within the Plaintiff/Applicant's suit property which purported scheme was illegal, null and void ab initio. See paragraphs number 4, 5 &6 of the Reply to Defence dated 14th January 2023.

16. The Defendant/Respondent further alleged that there was a pending suit between parties herein being Mombasa ELC No. 125 of 2018 seeking similar orders to the ones sought in this suit and that there were injunctive orders that were issued in the former. See Paragraphs 5, 6, 7, 8, 9,10 and 11 of the Replying Affidavit.However, the said Mombasa ELC No. 125 of 2018 was between "Basil Criticos – Versus - AIC Makutano & Others and while it was the case that an application had been made in the said suit seeking joinder of the Plaintiff/Applicant herein to the said ELC No. 125 of 2018 as 2nd Plaintiff and further seeking joinder of the Defendant/Respondent herein as one of the Defendants to the said suit, the said application had not been heard and determined.

17. The Learned Counsel submitted that consequently, as things stood, neither the Plaintiff/Applicant herein nor the Defendant/Respondent herein were parties to the said Mombasa ELC No. 125 of 2018. It followed therefore that injunctive orders could not have been issued in Mombasa ELC No. 125 of 2018, as the Defendant/Respondent alleged, against persons such as the Defendant/Respondent who were not parties to the said suit and who, as at the date of filing of these submissions were still not parties to the said suit. See paragraph 7 of the Plaintiff/Respondent's Reply to Defence dated 14th January, 2023.

18. The Learned Counsel argued that the Defendant/ Respondent had also admitted having trespassed onto the suit portion of the suit property by putting up a fence and by placing materials on the suit land. See the contents Paragraphs 18 & 19 of his Replying Affidavit to the application. By reason of the foregoing, the Plaintiff/Applicant submitted that it had met the first test of establishing that it had a genuine and arguable case which had a probability of success. That the Plaintiff/Applicant's right to ownership, possession, quiet enjoyment and full use of its suit property had been infringed upon by the Defendant/Respondent by way of his trespassing acts which calls for an explanation from the Defendant/Respondent. See the decision of the court in "Mrao Ltd (Supra)".

19. On the second test, the Learned Counsel submitted that it was likely to suffer damage that could not be adequately compensated in damages should an injunction not be granted at this stage of the suit. On this point, the Plaintiff/Applicant relied on the case of: "*Olympic Sports House Ltd – Versus - School Equipment Centre Ltd* Civil Case No. 190 of 2012 (2012) eKLR" where the High Court in Nairobi held that:-

> " As regards the second limb of *Giela –Versus - Cassman Brown, I have always held the view that once a party establishes that a Defendant has breached an express provision of the law, an injunction should issue to aid the law. In the case of* Loldiaga Hills Ltd & 2 others –Versus - James Wells & 3 others// (UR), I held that :-
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> "Be that as it may, I hold the view that it is not always mandatory that where damages are an adequate remedy an injunction should not issue. In HCCC No. 33 of 2011 *Payless Car Hire and Tours ltd – v- Imperial Bank* Ltd (UR), I held that:-
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> "On the second limb of *Giella –Versus - Cassman Brown*, the Defendant has asserted that as a financial institution, it is capable of compensating the Plaintiff and therefore damages are an adequate remedy. As already stated above, I have never understood the law to be that a wronged party cannot obtain an injunction because the wrongdoer is capable of compensating such party with damages. More so, when the act complained of is an illegal act that blatantly flouts the law a court of equity cannot fold its hands and condone the flouting of the law on the basis that damages are an adequate remedy. Whilst I am alive to the fact

that the 2nd limb of Giella –Versus - Cassman Brown is to the effect that an injunction will normally not be issued where damages are an adequate remedy, I venture to suggest that that principle is not couched in mandatory terms. The East African Court of Appeal in laying down the test in Giella – v- Cassman Brown put the 2nd limb in a permissive form as opposed to the 1st limb. His Lordship Spry V.P delivered himself thus in *Giella – Versus - Cassman Brown* (1973) EA 358 at 360:-

'First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

As it can be noted from the quotation above, whilst the East African Court of Appeal in its wisdom courched the 1st limb in mandatory terms, the court courched the 2nd limb in permissive terms:-

'... an injunction will not normally be granted ....' it is my understanding of the said portion of the Court of Appeal for East Africa's holding to mean that there may be circumstances where although damages may be adequate but nevertheless an injunction would issue. Each case has to be dealt with according to its own peculiar circumstances."

I am not alone in this. In *Kanorero River Farm Ltd and 3 others – Versus - National Bank of Kenya Ltd* (2002) 2 KLR 207 Ringera J (as he then was) held at page 216:-

"I would for those reasons alone accede to the Plaintiff's prayer for interlocutory injunction in respect of the two properties on the grounds that the 1st and 2nd Plaintiffs have a very strong prima facie case with a probability of success. I would not be deterred by any argument that the National Bank could compensate them in damages if it failed at the trial. In my opinion, no party should be allowed to ride roughshod on the statutory rights of another simply because it could pay damages."

20. The Defendant/ Respondent alleged to have been allotted a purported subdivided portion of the suit property after it was purportedly sold to the settlement fund trustees. The fact of the matter is that neither the Plaintiff/Applicant's predecessors-in-title nor the Plaintiff/Applicant sold the suit property to the Settlement Fund Trustees, or at all. Moreover, the Plaintiff/Applicant's predecessor-in-title *Basil Criticos* has in said Mombasa ELC No. 125 of 2018 sought joinder of the said Settlement Fund Trustees as a Defendant to the suit where orders are sought directing the Chief Land Registrar and the District land Registrar, Taita Taveta to cancel the illegal title deeds issued respecting the suit property.

21. The Learned Counsel submitted that therefore that should an injunction not be granted as sought, then it stood to suffer loss of ownership of the portion of the suit property which the Defendant/ Respondent had admitted to trespassing upon and in respect of which the Defendant/Respondent claimed to have title should the Defendant/Respondent sell the said portion of the suit property to unsuspecting purchasers who may then argue innocent purchase without notice of any defect in Defendant/Respondent's title.

22. Further, should an injunction not be granted as sought, then the Plaintiff/Applicant stood to suffer loss that may not be adequately compensated in damages since the financial capacity or ability or assets of the Defendant/Respondent remained unknown and was simply a matter for speculation.

23. Further the Learned Counsel submitted that a court of equity could not fold its hands and condone the flouting of the law on transfer and ownership of title to property by which the title holder had to

consent to transfer of its interest in the property and/or be adequately compensated] on the basis that damages were an adequate remedy. The Plaintiff/ Applicant placed reliance on the persuasive decision of the court in "*Joseph Siro Mosioma - Versus - H.F.C.K and 3 Others* Nairobi HCCC NO. 265 OF 2007 (UR)" (cited in "*Olympic Sports House Ltd – Versus - School Equipment Centre Ltd* Civil Case No. 190 OF 2012 [2012] eKLR" above) where Warsame J held:-

> "On my part, let me restate that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be a substitute for the loss which is occasioned by a clear breach of the law. In any case, the financial strength of a party is not always a factor to refuse an injunction. More so, a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction."

24. In the circumstances the Plaintiff/Applicant would be left without an effective remedy in the event that it was to succeed on the suit, if in the meantime the Defendant/Respondent had disposed of the portion of the suit property that he had trespassed upon. On the third test of whether the balance of convenience was in favour of granting the injunctive orders sought, the Learned Counsel asserted in the affirmative. The preservation of the subject matter of this suit by way of an injunction pending the hearing and determination of the suit will support the hearing of this suit since it was foreseeable that nothing other than an injunction] would prevent the Defendant/Respondent from selling and transferring the suit portion of the suit property to third parties claiming innocence.

25. The Learned Counsel argued that it would be an arduous task for the Plaintiff/Applicant to mount a successful claim to the suit portion of the suit property should title of the same be transferred from the Defendant/Respondent to third parties. Therefore, there existed a much larger risk of inconvenience and injustice to the Plaintiff/Applicant should the Honourable Court fail to preserve the suit property by way of an injunction.

26. In Conclusion, the Learned Counsel opined that it had satisfied the threshold set out in the decision of the court in "*Giella -Versus - Cassman* (*Supra*)" to warrant grant of an injunction pending hearing and determination of this suit. Therefore the Notice of Motion application dated 4th December 2022 should be allowed with costs to the Plaintiff/Applicant and prayer (3) granted.

B. The Written Submission of the Defendant/Respondent

27. On 10th March, 2023, the Learned Counsel for the Defendant/Respondent through the Law firm of Messrs. Sharia Nyange Njuguna & Co Advocates filed their written submissions dated 10th March, 2023. Mr. Nyange Advocate commenced by informing Court that the Applicant through a Notice of Motion dated 4th of December 2022 sought a temporary injunction on LR. 10287/4 within Taita-Taveta County pending a hearing and determination of the suit and the application and the costs of the suit. The Defendants/Respondents filed their Relying Affidavit dated the 19th December 2022.

28. The Learned Counsel submitted that the Plaintiff/Applicant alleged that the Defendant/Respondent encroached onto the property of their property without any consent of the applicant and after requesting the respondents peacefully vacate the premises they refuse.The Plaintiff/Applicant further alleged that the Plaintiff/Applicant had assembled construction materials in readiness to construct buildings hence the urgency to move to court for an injunction.

29. The Learned Counsel argued that they would suffer irreparable harm and damage if the court never intervened and issued the injunction orders.

30. The Learned Counsel rehashed the claim by the Plaintiff/Applicant to the effect that the Plaintiff/ Applicant claim to be the owners of LR No. 10287/1 and that he had a title deed for plot no.779/

Taita/Taveta/Lake Jipe Scheme. He even annexed a copy of search certificate no.1407/22. Further, he had claimed to have been the owner of the property since year 2015.To all these claims and allegations, the Learned Counsel stated that the parties herein were the same parties in the Civil case "ELC no. 125 of 2018 B*asil Criticos & Kenya Trade development Co limited – Versus - AIC Makutano & others*" and was pending a hearing before another court. He argued that the Defendants/The Respondents posited that the same order being sort herein was already obtained in the ELC no.125 of 2018.

31. The Learned Counsel submitted that the Defendant/Respondent further stated that the property was fenced immediately after owning the property back in the year 2015. The material in suit land was not for construction and had not even begun digging the foundation.

32. Accordingly, the Learned Counsel enumerated the following as being the issues for determination for the Honourable Court. These are:-

    a. Whether the suit herein was "*Sub – Judice*"?

    b. Whether the application was "*Re – Judicata*"?

    c. Whether the Plaintiff/Applicant had met the threshold for an injunction to be issued?

    d. Who bears the costs?

33. On the issue of whether the application was "Res Judicata", the Learned Counsel argued that the application was seeking similar and identical orders as those already obtained in another "Civil Case Mombasa ELC no. 125 of 2015 Basil Criticos & Kenya Trade Development Company Limited – Versus - AIC Makutano and others before Hon. Justice Naikuni, and therefore, it was Res - Judicata. In the said suit there was already an injunction which was already registered in the title as was evident on the official search that has been attached by the Plaintiff/Applicant herein at Paragraph 9 of the Supporting Affidavit to the Notice of Motion application. The parties in this current suit were the same parties in ELC No. 125 OF 2018, there was already an injunction in issues in respect of the suit property in that file, the Plaintiff/Applicant herein was claiming to be the rightful owner in the suit property in Case no 125 of 2018 and into his current suit, in other words the suit property claimed was the same.

34. He submitted that the doctrine of "*Res judicata*" was provided under the provision of Section 7 of the *Civil Procedure Act* which states as follows:-

> " No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

35. The Learned Counsel went on to submit that the matter being litigated checked all the boxes for Res Judicata. Further, a perusal of the Plaintiffs/Applicants list of documents on page 16 under the certificate of official search clearly showed that the suit property specifically under the proprietorship section stated that there was an injunction order in ELC NO. 125 OF 2018 at Mombasa.

36. On the issue of whether the suit herein was doctrine "Sub – Judice", the Learned Counsel argued as stated earlier, this matter was already before another court of competent jurisdiction. The Plaintiff/Applicant sought a joinder in ELC No. 125 of 2018 and at the time of filing these submissions both the Plaintiff/Applicant and Defendant/Respondent had been admitted as parties and the court had

directed the Defendant/Respondent to file their defence in the Civil Case ELC No. 125 of 2018. This brought the Court to the point that suit was Sub-judice.

37. According to the Learned Counsel, Sub - Judice was provided under the provision of Section 6 of the *Civil Procedure Act*, Cap. 21 in the following terms:-

> " No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they are any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed."

38. The Learned Counsel relied on the case of: "*Republic – Versus - Registrar of Societies-Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others* [2017] eKLR" the Court held that:

> " .....Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed..."

39. He held that the rationale for this principle was restated in Kampala High Court "Civil Suit No. 450 of 1993 - *Nyanza Garage – Versus - Attorney General*" in which the Court held that:

> " In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits."

40. It is clear what the doctrine of sub-judice entails; the same parties involved in the same/similar subject matter in various suits in different Courts. The matter herein meets the threshold.

41. On whether the Plaintiff/Applicant had met the threshold for an injunction to be issued, the Learned Counsel submitted that in the likely event that the court finds that the suit and the application were not "Res – Judicata" or "Sub – Judice" respectively, the Defendant/Respondent had followed all the orders from ELC No.125 of 2018 and the fencing as alleged by the Plaintiff/Applicant was done in 2015 when the Plaintiff/Applicant purchased the property to keep off herders. The materials on the suit land were not for construction as rightfully stated by the Defendant/Respondent herein.

42. The Defendant/Respondent herein rightfully held a title to the suit land and until the same was canceled and or revoked then his actions could not be faulted or be said to be illegal and deemed as trespassing. The Plaintiff/Applicant's title had to be validated and the Defendant/Respondent's titles cancelled by an order of the court. Until this was done then the Defendant/Respondent's Actions onto the suit land was justified by the title that he held. The Learned Counsel reiterated that principles for granting injunctions are laid out in the case of "*Giella – Versus - Cassman Brown* (*Supra*) to wit that the Plaintiff/Applicant must show that he had "a prima facie case' with a probability of success and that

he stood to suffer irreparable loss which may not be compensated by an award of damages. If the court was however in doubt on the foregoing, it should decide the matter on the balance of convenience.

43. If the court was to grant the injunction sought by the Plaintiff/ Applicant then it would be validating the Plaintiff/Applicant's title over the title held by the Defendant/Respondent herein. In other words the Plaintiff/Applicant's propitiatory rights over the title would had been viewed as been superior to those of the Defendant herein. This could not be done until the matter was decided on full trial.

44. The Learned Counsel asserted that the Defendant/Respondent was the owner of the suit property and had a title deed in this respect and had annexed said title deed. A certificate of search dated 30th August 2022 annexed as the Defendant/Respondent's list of documents showed that the Defendant/ Respondent was the absolute owner of the said suit property. There was no mention at all of the Plaintiff/Applicant in the Certificate of Title dated September 2017. Thus prima facie case limb failed this test.The Plaintiff/Applicant had not demonstrated irreparable loss which could not be compensated by an award of damages. The Plaintiff/Applicant only alluded that the fact that the Defendant/Respondent might sell the property and gives no evidence of any sought. In any event, the Plaintiff/Applicant claimed to be the registered owner of the piece of property. This limb has not been proved by the Plaintiff/Applicant.

45. In conclusion, the Learned Counsel submitted that the Plaintiff/Applicant filed two applications one seeking joinder of parties in the ELC No. 125 of 2018 and from this application the orders of joinder were allowed by the court in No. 125 of 2018. Hence, there was absolutely no basis in filing the current suit and application in view of the fact that the Plaintiff/Applicant herein had sought joinder of the Defendant herein in the Civil case ELC No. 125 of 2018. The Plaintiff/Applicant herein should be condemned to pay cost in this Application.

V. Analysis & Determination.

46. I have carefully read and considered the pleadings herein by the Plaintiff/Applicant and the Defendant/ Respondent, the written submissions, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statures.

47. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-

    a. Whether the Notice of Motion application by the Plaintiff/Applicant dated 4th December, 2022 offends the doctrine of "Res – Judicata" as founded in law?

    b. Whether the Notice of Motion application by the Plaintiff/Applicant dated 4th December, 2022 offends the doctrine of "Sub – Judice" as founded in law?

    c. Whether the Notice of Motion application by the Plaintiff/Applicant dated 4th December, 2022 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

    d. Who will bear the Costs of Notice of Motion application 4th December, 2022.

Issue No. a). Whether the Notice of Motion application by the Plaintiff/Applicant dated 4th December, 2022 offends the doctrine of "Res – Judicata" as founded in law?

48. Under this Sub – heading, the Court wishes to deliberate on the doctrine of "Res Judicata" being an issue raised elaborately and extensively by the Defendant/Respondent herein while opposing the

application. Ideally, it is not an issue that this court may wish away that easily. It is set out in the *Civil Procedure Act*, Cap. 21 at Section 7 as follows:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

49. Further, the *Civil Procedure Act*, Cap. 21 also provides explanations with respect to the application of "the *Res Judicata*" rule. The Explanations 1 - 3 are in the following terms:

> " Explanation. (1)—The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.
>
> Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.
>
> Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other."

50. For clarity sake, the Court has sought solace from the *Black's law Dictionary* 10th Edition defines "Res Judicata" as:-

> " An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."

51. In essence therefore, the doctrine implies that for a matter to be "Res Judicata", the following three (3) ingredients have to be fulfilled. These are:-

    a. The suit or issue was directly and substantially in issue in the former suit.

    b. the matters in issue must be similar to those which were previously in dispute between the same parties; and

    c. the same having been heard and determined on merits by a Court of competent jurisdiction.

    The Court in the English case of "*Henderson – Versus - Henderson* (1843-60) ALL E.R.378", observed thus:-

    ".....where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

52. It therefore follows that a Court will as well invoke the doctrine in instances where a party raises issues in a subsequent suit, wherein he/she ought to have raised the issues in the previous suit as between the

same parties. In the case of "*Christopher Kenyariri – Versus - Salama Beach* (2017) eKLR", the court clearly stated the ingredients to be satisfied when determining Res Judicata thus:-

> " ...the following elements must be satisfied...in conjunctive terms;
>
> a. The suit or issue was directly and substantially in issue in the former suit
>
> b. Former suit between same parties or parties under whom they or any of them claim
>
> c. Those parties are litigating under the same title
>
> d. The issue was heard and finally determined.
>
> e. The court was competent to try the subsequent suit in which the suit is raised."

53. In order therefore to decide whether this case is res judicata, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;

i. what issues were really determined in the previous case;

ii. whether they are the same in the subsequent case and were covered by the decision of the earlier case.

iii. whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.

54. The doctrine of *res judicata* has stated has been explained in a plethora of decided cases. In the recent case of the "*Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others* (2017) eKLR", the Court of Appeal held as follows:

> " Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in distinctive but conjunctive terms:
>
> a) The suit or issue was directly and subsequently in issue in the former suit.
>
> b) The former suit was between the same parties or parties under whom they or any of them claim.
>
> c) Those parties were litigating under the same title.
>
> d) The issue was heard and finally determined in the former suit.
>
> e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

55. The court explained the role of the doctrine thus:

> " The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would

be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundation of res judicata thus rest in the public interest for swift, sure and certain justice."

56. Applying the foregoing to the present case, I have had the opportunity of assessing the application dated 16th September, 2022. Clearly, the said application revolves around granting an injunction orders. Hence, the issue herein is can it then be said that the matters in the Application have already been heard and determined by a Court of competent jurisdiction? According to the Defendant/Respondent, this application is seeking similar and identical orders as those already obtained in Mombasa ELC no. 125 of 2015 Basil Criticos & Kenya Trade Development Company Limited – Versus - AIC Makutano and others which is before Hon. Justice Naikuni, therefore, it is Res judicata. Evidently, in the said suit there is already an injunction issued by this Court on 18th November, 2020 and which has already been registered in the title. Further, this is a fact as is graphically indicated on the official search dated 30th August, 2021 that has been attached and marked as "BC" by the Plaintiff/Applicant herein at Paragraph 9 of the Supporting Affidavit to the Notice of Motion application. There is no doubt that the parties in this current suit are the same parties in ELC No 125 of 2018. Indeed, there is already an injunction in issues in respect of the suit property in that file, the Plaintiff/Applicant herein is Claiming to be the rightful owner in the suit property in Case no 125 of 2018 and in this current suit, in other words the suit property claimed is the same.

57. Additionally, having considered the pleadings and rival submissions by Learned Counsel for both parties, it is not in dispute, that the suit property in this instant case is L.R. No. 10287/4 measuring approximately 410.6 Ha and within Taita Taveta County. The suit property in the chamber summons dated 16th September, 2022 in the Civil case of "ELC No. 125 of 2018 Basil Criticos & Kenya Trade Development Company Limited (Supra) before this Honourable Court too is the same suit property in this instant case. Further, the claims are that the Plaintiff/Applicant in this instant suit is claiming to be the right owner of the same subject property in both suits. Hence, the provision of Section 7 of the *Civil Procedure Act*, Cap. 21 is very clear on the doctrine. Therefore, this instant application falls under what has been described under the proviso.

58. By a notice of Motion application dated 25th September, 2020 where the Plaintiff/Applicant sought amongst other orders were to wit

> "that pending the hearing and determination of this Application temporary order of injunction do issue restraining the said Marion Atieno Moon whether by herself, her representative servant, agent and/or assigns from developing, alienating selling, trespassing and/or in any other manner whatsoever interfering with or otherwise dealing with part or whole property known as Land reference No. 10287/4. ....." , It follows that this Honorable Court opined itself as follows:
>
> a. That the Notice of Motion application dated 25th September, 2020 has no merit as to the extent as granting of temporary injunction orders against the proposed Defendant by herself, servants, employees, agents and/or assigns and hence on that prayers it is stands dismissed with costs.
>
> b. That the Plaintiff/Applicant is granted the following orders:-
>
> i. Leave to join the Proposed Defendant into the suit within the next 14 days.

ii. Leave to amend the Plaint strictly to have the Proposed Defendant – Marion Atieno Moon as an additional and now the 40th Defendant in this suit by filing and serving the Amended Plaint within the next 14 days from the date of this ruling without fail.

iii. The Plaintiff/Applicant to serve the Proposed Defendant, now as the 40th Defendant herein with all the pleadings to this case within the next 3 days from the date of filing the Amended Plaint to enable her fully comply with the Provisions of Orders 6, 7 and 11 of the Civil Procedure Rules, 2010 within 14 days thereafter.

iv. The Proposed Defendant, now as the 40th Defendant to fully comply with the Provisions of Orders 6, 7, and 11 of the Civil Procedures Rules by filing and serving a Defence and/or a Counter Claim within 14 days of service and serve all parties.

v. That all the Defendants in this matter are granted corresponding leave of 14 days upon service with the Amended Plaint by the Plaintiff to file and serve their Amended Defence.

vi. That for expediency sake this matter and taking that the Pre-trial conference session was already conducted on 9th December, 2021 the matter be mention on 25th April, 2022 for the purposes of:-

a. Confirming and Ascertaining full compliance of these directions and finalizing on the Pre-trial conference.

b. Taking a hearing date of the full trial within the next 90 days from the date of this ruling.

c. That the Costs to be in the cause.

59. From the above, the Honourable Court observes that the Plaintiff/Applicant herein had been proposed as the 2nd Plaintiff in the previous suit which dealt with the same subject matter and an application of a similar nature. In view of the forgoing, I fully concur with the Learned Counsel for the Defendant/Applicant and find that the Notice of Motion application dated 4th December, 2022 is "Res Judicata". I therefore proceed to examine the second issue.

Issue No. b). Whether the Notice of Motion application by the Plaintiff/Applicant dated 4th December, 2022 offends the doctrine of "Sub – Judice" as founded in law?

60. The issues under this Sub heading are straight forward. As stated earlier stated this matter is already before another Court of competent jurisdiction. The Plaintiff/Applicant sought a joinder in ELC No. 125 of 2018. At the time of filing these submissions both the Plaintiff/Applicant and Defendant/Respondent had been admitted as parties. Indeed, the court had already directed the Defendant/Respondent to file their defence in the Civil case ELC 125 of 2018. Thus, it brings the Court to the point as to whether the suit offends the doctrine of "Sub – Judice". According to the Black Law Dictionary 9th edition, "Sub Judice means-"before a court for determination....."

61. The doctrine of res sub-judice prevents a court from proceeding with the trial of any suit in which the matter in issue is directly and substantially the same with the previously instituted suit between the same parties pending before same or another court with jurisdiction to determine it.

62. The provisions of Section 6 of *Civil Procedure Act*, Cap. 21 spells out the above principle or the doctrine as follows:-

> "No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim litigating under the same title, where such suit or proceeding is pending in the same court or any other court having jurisdiction in Kenya to grant the relief claimed."

63. Now before I apply this principle to the instant suit and that of suit filed by the Plaintiff in ELC 125 OF 2018, the Court wishes to state as follows. I have established that there is an ongoing suit in this Honourable Court touching on the same suit property, with the same claim and having the same parties. I am persuaded by the Defendant/Respondent's contention that the suits are similar. A determination of either of them, will obviously render the other spent and of no further use. The law requires that in a situation such as this, a subsequent suit is stayed as provided for under the provision of Section 6 of *Civil Procedure Act*, Cap. 21 arising from the rule of Res sub-judice. In the case of "*Kenya Bankers Association - Versus - Kenya Revenue Authority*, 2019 eKLR" the court had this to say:-

> "in addition, it is clear that the maters in issue in the suits or proceedings are directly and substantially the same. The parties in the suits or proceedings are the same. The *ex parte* applicant herein, is litigating on behalf of its 47 members, some of whom are parties in the existing suits. The suits are pending in the High Court which has jurisdiction to grant the relied claimed.
>
> A cursory look at the prayers sought in this case show that they relate to the same subject matter. However, the principle of sub judice does not talk about the "prayers sought" but rather "the matter in issue" I find that the matters in issue in the suits are substantially the same. In Re the matter of the Interim Independent Electoral Commission, the Supreme Court cited with approval the Australian decision where it was held: -
>
> ".... we do not think that the word "matter" ...means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter...unless there is some right, duty or liability to be established by the determination of the court..."

64. The rationale behind sub-judice rule is to prevent situation of having conflicting orders emanating from two or more different courts over the same subject matter. In the case of "David Ndii & others - Versus - Attorney General & Others 2021 eKLR", a bench of five Judges inter alia stated:-

> "The rationale behind this provision (Section 6 of the *Civil Procedure Act*) is that it is vexatious and oppressive for a claimant to sue concurrently in two courts. Where there are two courts faced with substantially the same question or issue, that question or issue should be determined in only one of those courts, and the court will...."

65. Legally speaking, the concept of sub judice is one that bars a Court from trying a matter that is in one way or other before another Court of competent jurisdiction by way of a previously instituted suit as long as it is between the same parties canvassing it under the same title. In essence, if both Courts

were to proceed with the matters on merit and determine them, without deference to the former, they would arrive at similar or different results on the same rights claimed by the same parties and there would be a duplication of the reliefs or a conflict of them, which would be a recipe for confusion and chaos in the legal system. In the alternative of the scenario immediately above, where one of the Courts determined the matter before it the one still pending would be res judicata.

66. In a recent decision, my brother Justice Mativo discussed the concept sub judice in the case of "*Republic – Versus - Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR" where he stated as follows:-

> " ...there exists the concept of sub judice which in Latin means "under Judgement." It denotes that a matter is being considered by a court or judge. The concept of sub judice that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage."

67. The import of the concept is that as soon as the Court finds a matter sub judice it stays immediately the proceedings until the prior one is heard and determined. On this point, the Supreme Court of Kenya in "*Kenya National Commission on Human Rights – Versus - Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)*", stated therein as follows: -

> "(67) The term 'sub-judice' is defined in *Black's Law Dictionary* 9th Edition as: "Before the Court or Judge for determination." The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives."

68. To avoid a situation such as the one described above, Parliament in its wisdom enacted the provisions to cater for cases where overzealous parties might run to and fro in the corridors of justice so as to mine for the best result in their estimation. In that regard, Section 5 of the *Civil Procedure Act* lays the basis for the operation of Section 6 of the *Civil Procedure Act* by stating that any court can try any suit of a civil nature as long as it has jurisdiction, except the suits in which that act or process is either expressly or impliedly barred. For this reason, this court having found that it is barred by the operation of law and in particular, Section 6 of the *Civil Procedure Act*, it lacks the requisite authority to hear and determine this suit.

69. The upshot of the above aversions by the Honourable Court, it is my finding that there is a suit before me that deals with the same parties and the same suit property meaning that continuous of this instant suit by this Honourable Court will place this suit in the definition of a suit that falls under the doctrine of sub judice.

70. For these reasons, therefore, I find that by virtue of the same the proceedings in this suit should be stayed in line with the doctrine of sub judice.

Issue c.) Whether the Notice of Motion dated 4th December, 2022 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

71. Under this sub heading, despite having stayed the proceedings in this matter due to the afore going reasons, I still feel obliged to go ahead and examine the merits of the injunctive prayers of the application dated 4th December, 2022 by the Plaintiff/Applicant herein. In saying so, I hold the view that the Honourable Court would have still examined the application were it not for its finding that the same is res judicata. As a background, the Plaintiff/Applicant commenced the instant suit by way of a Plaint dated 4th December, 2022 contemporaneously with the Notice of Motion application dated 4th December, 2022 filed under Certificate of urgency all filed the same date. He sought declaratory orders against the Defendant/Respondent for the alleged encroachment of the suit property permanent injunction orders restraining the Defendant/Respondent from entering the suit land, mandatory and permanent injunction directed at the Defendant/Respondent on the suit property which is the subject matter of the case. He claimed that the Defendant/Respondent was in the currently in the process of developing the said parcel of land whose impact would negate the prayers sought in the Plaint.The Plaintiff/Applicant claims to be the legal and registered proprietor to all that parcel of land known as Land Reference Number 1028/4 located in East of Taveta Township through a Certificate of Title No. Land Reference 189730 on which the Defendant/Respondent has allegedly encroached thereon.

72. In response to this, the Defendant/Respondent through a Replying Affidavit has averred that he denied that at any material times having ever purchased from and/or received any legal interest in any property from the Plaintiff/Applicant. Further, he avers that he has not had any dealings with the Plaintiff/Applicant or any of the Defendant/Respondent in the matter to remove all encroachments and further constructions on the suit property and massive projects. According to the Defendant/Respondent was is the registered owner of Plot No. Taita Taveta/Lake Jipe Settlement Scheme/799.

73. Now I must determine whether the Plaintiff/Applicant is entitled to a temporary injunction orders prayed for. Ideally, to commence the deliberations, the Honorable Court holds that the application by the Plaintiff/Applicant herein is premised the under the provision of Order 40 Rule 1 of the *Civil Procedure Rules 2010* amongst the provisions of the law. Which provides as follows: -

Order 40, Rule 1

Where in any suit it is proved by affidavit or otherwise—

a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

b) that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

74. The principles applicable in an application for an injunction were laid out in the celebrated case of "*Giella – Versus - Cassman Brown* (*Supra*), where it was stated: -

> " First an applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

75. The three (3) conditions set out in the above case of:- "Giella (*supra*)", need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of:- Nguruman Limited (Supra), thus:-

> " These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Limited - Versus - Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between".

76. In dealing with the first condition of "prima facie case, the Honorable Court guided by the definition melted down in the case of "*Mrao Limited* (*Supra*) Its stated thus:-

> " So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter". Page 8
>
> That "...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

77. In the instant case, I have noted that the Plaintiff/ Applicant though pleaded in its application and sought for temporary injunction orders against the Defendant/Respondent, which is rather peculiar, he never submitted on it at all in his written submission. Did he decide to abandon the prayer or not. That is not clear at all. I reiterate, the Court found that rather strange. Nonetheless, the provisions of Order 2 Rules 6 of the Civil Procedure Rules, 2010 holds that parties are bound by their own pleadings and ca not make a departure thereafter from it. Be that as it may, this Court will still proceed to squarely deal with the issue at hand and placed before it. The Plaintiff/Applicant holds that it had recently discovered the Defendant/Respondent had allegedly purchased several parcels of land within the Plaintiff/Applicant's property and was currently constructing permanent structures on the said property the subject matter of this suit. It averred that his actions amounted to encroachment and/or trespass and ought to be estopped pending the hearing and determination of this suit. It

asserted that unless the temporary injunction orders were granted and he be restrained either by himself here representatives, servants, agents and/or assigns from developing, alienating, trespassing selling interfering with or otherwise dealing with any part or whole property the object of this suit would be defeated and rendered nugatory.

78. In the case of "*Mbuthia – Versus - Jimba credit Corporation Ltd* 988 KLR 1, the court held that: -

> " In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties cases."

79. Similarly, in the case of "*Edwin Kamau Muniu – Versus - Barclays Bank of Kenya Ltd* the Court held that: -

> " In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria."

80. The Court fully agrees with the Defendant/Respondent that this Honourable Court indeed there was an injunction granted by this Court in ELC No. 125 of 2018 on 18th November, 2020 and which was registered against the title as seen from the official search of 30th August, 2022 annexed by the Plaintiff/Applicant. The Defendant/Respondent herein also averred that he is the registered owner of Plot No. 779 Taita Taveta/ Lake Jipe Scheme. Thus, the Honorable Court concludes that the Plaintiff/ Applicant has failed to establish any "Prima facie" case to be considered for the temporary injunction sought. On arriving at this decision, has also relied on the decisions of "*Kenya Horticultural Exporters Pg. 1977 Limited –Versus - Pape* 1986 KLR 705", *"Nguruman Limited –Versus- Jan Bonde Neilson & 2 Others* 2014 eKLR".

81. It is trite law that taking that the grounds for granting temporary injunction as set out in the "*Giella – Versus - Cassman Brown* case (*Supra*)" are in sequential pattern and now that the Plaintiff/Applicant has failed to prove the first grounds, this Honorable Court need not spend more time venturing into the other well - known two (2) grounds. But for the benefit of doubt, this Honourable Court holds that the Plaintiff/ Applicant is unlikely to suffer any irreparable damage to occur due to the ostensible invasion the fact that there is no prima facie case he cannot claim to suffer any irreparable damage at all and hence even the balance of convenience tilts in favour of the Defendant/Respondent. In order to show irreparable harm, the applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. This position was upheld in the Court of Appeal Case of "*Kenya commercial Finance Co. Limited –Versus - Afraha Education Society* (2001) 1 E.A. 86" as follows:-

> " The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is .....Sequential so that the second condition can only be addressed if the first one is satisfied. The same position was upheld in Court of Appeal (Mombasa) No. 8 of 2015 – Hassan Huri – v- Abdulrazak Huri Ibrahim",

82. For these reasons, therefore, the Honorable Court concludes that the application has no merit and therefore fails under this sub - heading.

Issue No. d). Who will bear the Costs of Notice of Motion application 4th December, 2022.

83. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court "*Jasbir Rai Singh – Versus Tarchalan Singh*" eKLR (2014) and *Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited*, eKLR (2014).

84. In this case, as Court finds that the Applicant has not fulfilled the conditions set out under Order 40 Rule 1 of the Civil Procedure Rules, 2010 and the application as it is having been adjudged to be contrary to the doctrine of sub judice and res judicata, I thereby award the costs of the same to the Defendant/Respondent.

VI. Conclusion & Disposition

85. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience.

86. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and makes below order:-

    a. That the Notice of Motion application dated 4th December, 2022 be and is found to lack merit and is hereby dismissed in its entirety.

    b. That the instant suit is hereby stayed pending the hearing and final determination of the Civil case ELC No. 125 of 2018.

    c. That the injunctive orders sought in the Notice of Motion application dated 4th December, 2022 are thereby not sustainable.

    d. That for the avoidance of doubt, interim orders that were issued on 13th December, 2022 be and are hereby vacated.

    e. That the parties are directed to move this Court appropriately within three months after the final determination of the Civil Case ELC 125 OF 2018 for directions. The matter to be mentioned on 15th February, 2024.

    f. That the cost of this application is awarded to the Defendant/Respondent to be bore by the Plaintiff/Applicant.

    It Is So Ordered Accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 2ND DAY OF OCTOBER 2023

.....

HON. JUSTICE L. L. NAIKUNI, (JUDGE)

ENVIRONMENT AND LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

a. M/s. Yumna, the Court Assistant.

b. Mr. Obok Advocate for the Plaintiff/Applicant.

c. No appearance for the Defendant/Respondent.